

# University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Quarterly, November to June, by the University of Pennsylvania Law School,  
at 34th and Chestnut Streets, Philadelphia, Pa.

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VOL. 73.

MARCH, 1925.

No. 3.

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## UNIFORMITY IN THE MARITIME LAW OF THE UNITED STATES (II).\*

Recognition of the Doctrine: The Later Period.

In the history of our maritime law, much favors and much is opposed to the ideal of uniformity. Judges and others, differing as to its recognition as a rule of law, select whatever favors the position they are taking and declare that it illustrates the general rule, and that all the rest turns upon special, peculiar considerations. "As to the spectre of a lack of uniformity," said Justice Holmes, "I content myself with referring to *The Hamilton*, 207 U. S. 398,406."<sup>1</sup> *The Hamilton*, in short stands for the general rule. Justice McReynolds, however, regards this case as the exception<sup>2</sup> and deduces his general rule from other cases. Learned justices here, as elsewhere, pass each other by, going rapidly in opposite directions, without any real clash. Their opinions merely show that they disagree. A is so, B is not, says one: B is so, A is not says the other. Since they differ, they owe it to each other and to us to justify their contradictions. Justice Holmes should have explained why lack of uniformity is merely a spectre ("a ghostly apparition" . . . "an appearance of the

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\* Continued from 73 U. OF PA. L. REV. 123-141.

<sup>1</sup> *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 223 (1917), dissenting opinion.

<sup>2</sup> p. 216.

dead as when living"—Cent. Dic.) ; Justice McReynolds, why his authorities really stand for uniformity, and why in principle it is desirable.

This phenomenon is also illustrated in the attitude taken towards the cases which establish that admiralty courts alone may entertain proceedings to enforce a maritime lien, our next subject for discussion. Justice McReynolds relied upon the first of these (*The Moses Taylor*<sup>3</sup>) in establishing his major premise,—that is, as showing that state statutes may not contravene the general maritime law.<sup>4</sup> Justice Holmes declared that this case is not in point,<sup>5</sup> and Justice Pitney: "Those remedies which were held not to be common law remedies, within the saving clause, in *The Moses Taylor* . . . provided for imposing a lien on the ship by proceedings in the nature of the admiralty process *in rem*, and it was for this reason only that they were held to trench upon the exclusive admiralty jurisdiction of the courts of the United States. . . . Where a state statute conferred a lien operative strictly *in rem*, it was uniformly held not enforceable in the state courts, but only because it trenched upon the peculiar jurisdiction of the admiralty, and therefore was not a "common-law remedy," within the saving clause of the Judiciary Act of 1789."<sup>6</sup>

According to Justice Pitney, therefore, there was a *peculiar* jurisdiction or, rather, process, which the admiralty alone might enforce. His assumptions are that the process was sufficiently peculiar to be differentiated from common law process, and that jurisdiction to enforce it was exclusively given to admiralty courts by the Constitution. In short, such exclusiveness has an historical sanction, and, since he was answering Justice McReynolds, it has no other sanction. It depends upon mere history, and so far as the doctrine of uniformity is concerned has no bearing at all. This was apparently Justice Holmes' view also.

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<sup>3</sup> *The Moses Taylor*, 4 Wall. 411 (1866).

<sup>4</sup> *Southern Pacific Co. v. Jensen*, 216.

<sup>5</sup> p. 222.

<sup>6</sup> pp. 236, 238.

A result reached on historical grounds cannot be made the basis for what might be called a sociological conclusion. We must take judges at their word. *Inclusio unius est exclusio alterius*. Other premises, inarticulate in the actual opinion, must be rigidly excluded.

Even though it be conceded that historical truth is less important in the actual development of the law than what judges conceive to be the truth, even though we no longer believe that having destroyed the historical precedents for a decision that decision is at once necessarily wrong, even though in the present case if the decision in question was based on a certain conception of legal history wholly dissociated from the doctrine of uniformity, it does not greatly matter whether that conception was well or ill founded, the dissociation being the same in either case, it is perhaps worth while to consider how far the rule of *The Moses Taylor* and of *The Hine v. Trevor* and later cases<sup>7</sup> has a proven historical basis, and how far, indeed, the opinions there uttered did purport to follow history.

Every one will admit that if judges invent "history" to justify a conclusion, what they have invented is not really history. The law may be what they declare it to be, but the same is not true of history, even though lawyers frequently prefer a judicial declaration as to what history is to the evidence in the sources relied upon by historians. Of course no one accuses Justices Pitney and Holmes of having invented history; at most they merely misconceived it; but I venture to say that there is no proven sound historical basis for the rule of the cases above referred to, and, further, that those decisions themselves do not wholly correspond to the best guess that we can make at actual historical conditions.

At the time of the Constitution, a proceeding directed primarily, in form at least, against a vessel or her proceeds, or against cargo or its proceeds, was undoubtedly the usual one in the ad-

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<sup>7</sup> 4 Wall. 555 (1866); *The Belfast*, 7 Wall. 624 (1868); *The Glide*, 167 U. S. 606 (1897); *The Robert W. Parsons*, 191 U. S. 17 (1903); *Rounds v. Cloverport Foundry Co.*, 237 U. S. 303 (1915).

miralty courts, but proceedings against named individuals, seeking money judgments without reference to any particular thing, did also occur.<sup>8</sup> The first method of proceeding certainly differed in form from those known to the then common law, in which property was attached. But whether the difference went deeper than mere form it is impossible to say with certainty. The mere fact that a particular object, rather than a person, is named as adversary to the plaintiff and that the human beings, really interested, are cited as its owners, rather than as "defendants" may later breed many consequences in legal theory, but is in itself unimportant. Unless we imply those consequences from the form or find evidence that they legally existed, we are not justified in regarding the admiralty process as sufficiently peculiar to justify our believing that anyone intended a particular rule of jurisdiction in regard thereto. One of the most striking incidents of the admiralty action *in rem* as we now know it is, of course, the fact that on a sale a title "good against the world" passes. I have found no evidence that this incident attended the admiralty process as known at the time of the Constitution. Such process, as described in Browne, does not necessarily carry with it that incident in instance cases.<sup>9</sup> It should be remembered that English practice may well have been the model for our own, and that whatever the rule may have been in prize cases it was not settled till later that these were "admiralty" and not something special.<sup>10</sup> The mari-

<sup>8</sup> An examination of the state admiralty cases reported in Peters' Admiralty Decisions, Bee's Reports, and Hopkinson's Miscellaneous Essays, shows the following proceedings *in personam* in the Admiralty Court of Pennsylvania: Dean v. Angus, Bee 369, 378 (two cases, 1785); Smith v. Leard, Bee 199 (1784); Anderson v. Forbes, Bee 200 (1786); Dixneuf v. Lacaze, 3 Hop. Misc. Essays 69 (1780); Marau v. Baudoin, 2 Pet. Adm. 475 (1788). See, also, Brevoor v. The Ship Fair American, 1 Pet. Adm. Dec. 87, 94-5 (Dist. Ct., Pa., 1800). For Massachusetts, see *The Underwriter*, 119 Fed. 713, 735 (Dist. Ct., Mass., 1902). But cf. Scollay v. Dunn, Quincy 74 (1763); Montgomery v. Wharton, Bee 388 (Adm. Ct., Pa., 1780). The power of a federal admiralty court to proceed *in personam* was definitely settled at least as early as 1825: Manro v. Almeida, 10 Wheat. 743.

<sup>9</sup> Civil Law and Admiralty (first ed. 1798), chapter 9. The earliest case discovered is also explainable on other grounds: Trump v. Ship Thomas, Bee 86 (Dist. Ct., S. C., 1796). Possibly Judge Burrell in England held this view even earlier: Marsden's Burrell's Reports, 383. By 1813, however, the rule seems to have been recognized: *The Fortitude*, 7 Cranch 423; see, also, *The Mary*, 9 Cranch 126, 144 (1815).

<sup>10</sup> Glass v. The Sloop Betsy, 3 Dall. 6 (1794).

time *lien*, the existence of which is of course not necessarily involved in the existence of the action *in rem*, was at best inchoate.<sup>11</sup> Talk was of hypothecations and material men's liens, usually based upon possession, and these may of course have effective legal existence without the coexistence of the right to proceed *in rem* as we know it today. Indeed, it is not too much to say that maritime liens did not take form here until many years later; and continental law, particularly with reference to the privilege, was of great influence.<sup>12</sup> That fully developed legal institution, which we sometimes refer to as the maritime lien and sometimes as the right *in rem*, because with us the two go together, but which really is a combination of two more or less different things, was known and considered in *The Moses Taylor*. Only by assuming a great deal, however, can we say that it was known at the time of the Constitution. If known at all, it was known at best as a mere budding thing, for certainly a budding thing was all it then was. Its major legal incident—the persistence of the lien in spite of subsequent changes in title in the property enlienated, necessarily based upon the power of the court to deal with the property as property and not merely with a respondent's interest therein—is certainly not shown to have been then clearly recognized. Unless we can prove that the framers knew an institution, we are scarcely justified in saying that they intended to perpetuate it. All we can surely say they knew was that, in admiralty, process usually ran against a thing, and, at common law, against a person, a difference of small importance taken by itself, as has been shown. In short, how can we say that the framers conceived of admiralty process as differing in any considerable degree from that known to the common law?

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<sup>11</sup> R. G. Marsden, 1 Select Pleas Adm., lxxi, lxxii; Roscoe's Adm. Practice, 4th ed., 31 *et seq.*; 1 Halsbury, Laws of England, "Admiralty," art. 88; *The Underwriter*, 119 Fed. 713, 721 *et seq.* For instances of growth in England in the direction of the maritime lien, before the Constitution: see Burrell, 62, 76 (1767-68), 285 (1703), 331 (1786), 288 (1705); and *The Underwriter*, *loc. cit.*

<sup>12</sup> Cf. *The Young Mechanic*, 2 Curtis 404 (Cir. Ct., Me., 1855); *The Rebecca*, 1 Ware 187 (Dist. Ct., Me., 1831); *The Underwriter*, *supra*, 714 *et seq.*; *Vandewater v. Mills*, 19 How. 82 (1856).

How can we say, therefore, that they, the framers, intended a difference between jurisdiction to enforce a maritime lien by process *in rem* with this legal incident and jurisdiction to enforce process *in personam*, the first to be exclusive in the federal courts, the second concurrent in federal and state courts? It is as likely that they intended jurisdiction of both to be exclusive or of both to be concurrent.

Nor, in *The Moscs Taylor* and its successors, do we find the court relating the rule of exclusiveness in contrast to the rule of concurrency, as Justice Pitney did, to an intent on the part of the framers. Furthermore the field in which jurisdiction must be exclusive is not always declared to be the field for which the best historical argument can be made: cases where process is strictly *in rem*, title on sale to be good against the world. History, in other words, does not clearly support the historical argument on which those cases are supposed to be based, nor are those cases altogether based on the historical argument alleged. In *The Moscs Taylor*,<sup>13</sup> action was brought in a state court under a state statute against a vessel by name to enforce a maritime contract. This process, Justice Field declared, was in nature and had the incidents of a suit in admiralty, the characteristic feature of which is that the vessel is impleaded as defendant and is judged and sentenced accordingly. "It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world." (Of course there is a *non sequitur* here. Impleading the vessel by name and as defendant does not necessarily mean that the vessel may be sold and a title passed free of all other claims or liens. Justice Field assumed without inquiry that the California statute intended a sale to have this effect.) He then points out that under the Constitution, jurisdiction of some matters is exclusively in the federal courts and of others concurrently in them and in the state courts. The Judiciary Act of 1789, he says, proceeds on this theory, wherein it gives exclusive jurisdiction to the federal courts of all admiralty and maritime cases. (It would therefore seem

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<sup>13</sup> 4 Wall. 411 (1866).

that according to him, the Constitution instead of sanctioning a *difference* between admiralty process and common law process so far as jurisdiction goes, intended just the opposite.) He then refers to the "saving clause" without expressing any opinion on its constitutionality—unnecessary, because in this case it did not "save"—and declares that it "only saves to suitors 'the right of a common law remedy where the common law is competent to give it.' It is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding *in rem*, as used in the admiralty courts [at the time of the decision?], is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts it is given by statute."—Unless Justice Field believed the Judiciary Act to be a contemporaneous interpretation of the Constitution<sup>14</sup>—there is nothing to show he did—his opinion does not indicate that he believed that exclusiveness and concurrency proceeded from the Constitution itself.

On the other hand Justice Field does stress the really important feature of the right *in rem*, and seems to have had it principally in mind throughout. Perhaps a state process without this feature would have been held valid by him; but only if he had also related concurrency of jurisdiction *in personam* to the Constitution, as he did not do, could one find sanction for the historical argument in his opinion. In the next case *The Hine v. Trevor*,<sup>15</sup> Justice Miller, in holding that a proceeding authorized by a state statute was of the sort within the exclusive jurisdiction of the admiralty court, stressed its purely procedural features, the facts that the vessel may be made defendant, that the owners' names need not be mentioned, that the petition is in substance similar to a libel, that notice is in the nature of a monition, and that the vessel may be condemned and sold. There is nothing here clearly showing that he had in mind the effect of such a sale, nor that the state statute did purport to authorize the pas-

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<sup>14</sup> See 73 U. OF PA. L. REV. 129.

<sup>15</sup> 4 Wall. 555 (1866).

sage of more than the owner's title. In *The Belfast*, however<sup>16</sup> the point emphasized by Justice Field was explicitly mentioned. In *Johnson v. Chicago and Pac. Elevator Co.*,<sup>17</sup> Justice Blatchford, in holding a statutory state proceeding not within the prohibition, stressed the lack of the features relied upon by Justice Miller. It is probable that only the defendant's title would pass under a sale,<sup>18</sup> but apparently for all that Justice Blatchford cared the opposite might be true. In *The Glide*,<sup>19</sup> Justice Gray held a Massachusetts process invalid because it purported to give a lien, that is, a right in the thing itself (*jus in re*) as soon as the transaction occurred, and not depending upon the bringing of a suit for its enforceability. The reference to the *jus in re* may be the equivalent of Justice Field's reasoning, but in some respects the right a mere attaching creditor gets on seizure by the sheriff is a *jus in re*. Perhaps a law differing from the ordinary attachment only in the fact that the debtor's interest is subject to the creditor's claim in preference to those of other's later actually "attaching the property" would be invalid in the state courts according to Justice Gray, even though a sale under that law passed no more than the debtor's interest. In the *Robert W. Parsons*,<sup>20</sup> Justice Brown differentiated attachments from proceedings *in rem* on the ground that the former takes only the debtor's interest and the latter is directly against the vessel as debtor or "offending thing." Justice Hughes in *Rounds v. Cloverport Foundry Co.*,<sup>21</sup> defined the process which a state court may not enforce in these terms and in those of Justice Field as well. The result of these divergent opinions may be that in a border line case it will be hard to say whether the proceeding in question does or does not fall within the exclusive jurisdiction of the admiralty court. It can scarcely be said that historical evidence so meagre really supports definitions so different.

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<sup>16</sup> 7 Wall. 624 (1868).

<sup>17</sup> 119 U. S. 388 (1886).

<sup>18</sup> *Gindele v. Corrigan*, 129 Ill. 582 (1889); *Tugboat E. P. Dorr v. Waldron*, 62 Ill. 221 (1871).

<sup>19</sup> 167 U. S. 606 (1897).

<sup>20</sup> 191 U. S. 17 (1903); cf. also *Leon v. Galceran*, 11 Wall. 185 (1870).

<sup>21</sup> 237 U. S. 303 (1915).



None of this is very conclusive one way or the other so far as the doctrine of uniformity is concerned. For all that appears in *The Moses Taylor* and *The Hine v. Trevor*, the problem presented was limited to the interests of the litigants in those cases. But there can be no doubt that it had a much greater significance. Many states, especially those in the west, were asserting for themselves the broadest possible power over transactions which now we must admit to be maritime.<sup>22</sup> They can scarcely be blamed, for they had become familiar with water-borne commerce on the great rivers and lakes in that region before it was settled that transactions there were within federal admiralty jurisdiction. They legislated as to such commerce, copying largely from known maritime legal institutions, and in particular those that related to the maritime lien.<sup>23</sup> Cases were decided under such laws without thought of interference with federal jurisdiction and law.<sup>24</sup> When it was held that admiralty jurisdiction did extend to these waters, the states were naturally disinclined to give up their budding jurisprudence.<sup>25</sup> The position they took, however, would have led, not only to concurrency of jurisdiction in all maritime matters, but to concurrency of law as well. California, for example, asserted a full state admiralty jurisdiction including the power to decide such matters according to California law.<sup>26</sup> *The Moses*

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<sup>22</sup> See *Gindele v. Corrigan*, 129 Ill. 582 (1889); *Reynolds v. The Favorite*, 10 Minn. 242 (1865); *Parisot v. Helm*, 52 Miss. 617 (1876); *Keating v. Spink*, 3 Ohio St. 105 (1853); *Campbell v. Sherman*, 35 Wis. 103 (1874). See also cases in note 26.

<sup>23</sup> See cases in the preceding note for illustrations of state lien laws. Cf. also *Stewart v. Henry*, 3 Bush. 438 (1867), the admiralty rule of divided damages.

<sup>24</sup> *E. g.*, *Owners of The Farmer v. McCraw*, 26 Ala. 189 (1855).

<sup>25</sup> *E. g.*, *Fisher v. Luling*, 33 N. Y. Superior Ct. Rep. 337 (1871). Some states continued to enforce process *in rem* as to transactions on the Great Lakes, claiming the right to do so under the Act of 1845 (5 Stat. at L. 726): *Horn v. The Sch. Trial*, 22 Wis. 529 (1868); *Tugboat E. P. Dorr v. Waldron*, 62 Ill. 221 (1871). Cf. also *Dongan v. The Champlain Transp. Co.*, 6 Lans. 430 (1872). See *The Eagle*, 8 Wall. 15, 25 (1868). The Act of 1845 was not included in Rev. Stats., only its provision as to jury trial, Sec. 566, being retained.

<sup>26</sup> *Taylor v. Steamer Columbia*, 5 Cal. 268 (1855); *Averill v. Steamer Hartford*, 2 Cal. 308 (1852); *Meiggs v. Scannell*, 7 Cal. 405 (1857); *Warner v. The Uncle Sam*, 9 Cal. 697 (1858); *Ord v. The Uncle Sam*, 13 Cal. 369 (1859).

*Taylor* and *The Hine v. Trevor* struck at this budding jurisprudence and at assertions such as these. For the first time there was a serious conflict between federal and state authority over the *corpus* of maritime law. The sharpest issue at this time and the one calling for immediate settlement related to the power of the states to seize vessels and to enforce liens of their own creation by proceedings *in rem*. This issue was presented and decided in favor of federal authority. Other problems remained, of which that presented in the *Jensen* case was one. *The Moses Taylor* was but the first step in a continuous development. The court went no further than was necessary at the time, but it did decide this first great question in such a way as to unify federal admiralty jurisdiction, and to a large extent, the law to be applied in a matter as to which the states, each for itself, were then claiming an equal power—a claim which if sustained would result in great diversity in the law applicable to those engaged in maritime transactions. Whether or not the hand of the court was forced by a true or misconceived historical condition, the fact remains.

It must be conceded, however, that the Supreme Court did not go so far as it might have gone in the protection extended to the federal maritime law,—or rather, at least as against diversity of state law, to those engaged in maritime transactions. Nine years before *The Moses Taylor*, it had been held that process issuing from state courts, even in their exercise of concurrent jurisdiction over maritime matters, might run against property subject to a maritime lien, and that so long as such property was in the possession of state officers, the marshal might not seize it on admiralty process.<sup>27</sup> The court was careful to state that a sale following such seizure by the state did not by its own force displace the maritime lien, and this has ever since been regarded as

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<sup>27</sup> *Taylor v. Caryl*, 20 How. 583 (1857). See, also, recognizing the state's power to enforce attachment and levies of execution in the exercise of its concurrent jurisdiction: *Leon v. Galceron*, 11 Wall. 185 (1870); *Pennywit v. Eaton*, 15 Wall. 382 (1872); *Johnson v. Chic. & Pac. El. Co.*, 119 U. S. 388 (1886); *Norton v. Switzer*, 93 U. S. 355 (1876).

settled.<sup>28</sup> Even so, there is a substantial impairment in the effectiveness of the admiralty proceeding, because of the delay which a seizure by state officers imposes upon the would-be libellant claiming a lien.

Let us recall for a moment the reasoning of Justice Field in *The Moses Taylor*. He seems to have believed that under the Constitution federal jurisdiction over admiralty and maritime matters was exclusive, and that the states could acquire concurrent jurisdiction, if at all, only under an act of Congress. In the case in question, however, the result is justified by reasoning that is opposed. Justice Campbell certainly believed that nothing in the Constitution led to the view that such concurrent jurisdiction was a matter of grace, but that it existed under that instrument itself. Discrepancies such as this cause despair of finding in the *opinions* of the Justices of the Supreme Court any final answer to the enigma of uniformity. When they believe it desirable to limit the extent of admiralty jurisdiction or the applicability of admiralty law, they find that limitation in reasoning A; when they wish to extend the one or the other, they resort to reasoning B. What matter that reasoning B in the first case or reasoning A in the second would lead to quite opposite conclusions!

As has been shown above, such a conflict between reasoning A and reasoning B runs through many of the cases relating one way or the other to the theory of uniformity. It is manifest particularly in those that interpret the saving clause in the Judiciary Act of 1789.<sup>29</sup> Not only are there interpretations A and B, but

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<sup>28</sup> *Moran v. Sturges*, 154 U. S. 256 (1894). May a state, in an action based upon a nonmaritime transaction, enforce against a vessel a statute which authorizes proceedings *in rem* in Justice Field's sense? To admit as much would interfere with maritime liens in admiralty courts, less often, perhaps, but quite as effectively as though states were permitted to enforce maritime liens *in rem*. The Supreme Court has never finally settled this question. There are conflicting dicta. That the state court may so do, see: *Knapp Stout & Co. v. McCaffrey*, 171 U. S. 638 (1900); *The Belfast*, 7 Wall. 624, 636 (1868); *The Robert W. Parsons*, 191 U. S. 17, 259 (1903). That it may not, see *Moran v. Sturges*, *supra*. As supporting this last view, see also *The Elexena*, 53 Fed. 359 (Dist. Ct., E. D. Va., 1892). The question was left open in *The Winnebago*, 205 U. S. 354 (1897).

<sup>29</sup> Act of Sept. 24, 1789, c. 20, Sec. 9, 1 Stat. at L. 73, 77; Jud. Code, Sec. 24.

interpretations C, D, E, etc., as well. That of Justice Field has already been referred to.<sup>30</sup> Apparently, according to him, the saving clause was at best a grant of concurrent jurisdiction to the states by the federal government. It did not save but gave, and all it gave was "a common law remedy," meaning by that phrase not such new forms of proceeding as the states might invent, but such forms of proceeding as were known of old at common law. According to Justice Campbell,<sup>31</sup> however, the saving clause, so to speak, saved nothing, because the states already had a power at least as extensive as this, and since the Constitution did not take it away, Congress could not give it back. Others have gone further in this direction, finding in the saving clause a contemporaneous interpretation of the Constitution to the effect that except as to one institution, proceedings to enforce a maritime lien, the states had not only concurrent jurisdiction but power to apply whatever law they wished in the exercise thereof.<sup>32</sup> Early cases so interpreted it without the limitations as to the maritime lien.<sup>33</sup> Others have found in it a saving of a remedy more extensive than that given at common law, though in the case in question merely in aid of an imperfect remedy already existing.<sup>34</sup> Others have argued that all it saved was a right to proceed in other federal courts under the diversity

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<sup>30</sup> See p. 229. Cf., also, *The Belfast*, 7 Wall. 624, 642, 644 (1868), Justice Clifford; *Moran v. Sturges*, 154 U. S. 256 (1844), Chief Justice Fuller; *The Hine v. Trevor*, 4 Wall. 555 (1866), Justice Miller; *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917), Justice McReynolds.

<sup>31</sup> *Taylor v. Caryl*, 20 How. 583 (1857). Cf. also *New Jersey S. N. Co. v. Merchants Bank*, 6 How. 344, 390 (1848), Justice Nelson; *Waring v. Clark*, 5 How. 441 (1847), Justice Wayne, perhaps the first interpretation of that clause in the Supreme Court, if not in any reported case. One may deduce from this theory that since the Constitution did not intend the states to stand still, they may create such new remedies as they see fit: *Johnson v. Westerfield's Adm'r*, 143 Ky. 10 (1911).

<sup>32</sup> *The Hamilton*, 207 U. S. 398 (1907), Justice Holmes. One may deduce from this theory that the states may create not only such new remedies but such new substantive law as they see fit, subject only to the exception of the proceeding *in rem* and perhaps to control by Congress acting under a proper authority. See also *Cashmere v. De Wolf*, 2 Sandf. (N. Y.) 379 (1849); *Baird v. Daly*, 57 N. Y. 236 (1874).

<sup>33</sup> Cf. *Reynolds v. The Favorite*, 10 Minn. 242 (1865); *Thompson v. SS. Julius D. Morton*, 2 Ohio St. 26 (1853).

<sup>34</sup> *Knapp Stout & Co. v. McCaffrey*, 171 U. S. 638 (1900), Justice Brown.

clause.<sup>35</sup> Nor is this all,<sup>36</sup> nor does it include the innumerable cases where a state court was held to have or not to have power to do a particular thing, and the saving clause was cited as authority and not otherwise interpreted. In the face of so many inconsistent interpretations, as in all cases where reasoning A is resorted to for the purpose of justifying one series of results and contradictory reasoning B for the purpose of justifying another, one seeking to find out what the law is, is justified in disregarding reasonings A and B both,—that is, in the present instance, the diverse interpretations of the saving clause—and in concentrating his attention upon the actual point decided. Nor can he be accused of not playing the game in so doing, since both or all the contradictory sets of reasoning are entitled to equal credit or discredit, unless it be the last one uttered. I confess that this is very nearly a cry of despair. At the risk of seeming to shirk responsibilities assumed in writing these articles, I shall say no more about the saving clause.

The many problems of our maritime law in relation to the doctrine of uniformity discussed in these articles, all have a common feature: what rules are to be applied by whatever court exercises jurisdiction over a maritime transaction. We have seen how the admiralty courts took or held to themselves exclusive jurisdiction of proceedings to enforce the maritime lien, and in a previous article how the jurisdiction thus taken or held resulted in uniformity of the law to be applied except as to the lien for materials, repairs, supplies or other necessities furnished to a vessel in her home port.<sup>37</sup> Through exclusiveness of jurisdiction, in other words, uniformity of a sort was accomplished. There remains for consideration the problem of the law that is to be applied in other transactions of a maritime nature. So far as our courts or legislatures have consciously striven to make this law uniform, we find recognition of the doctrine

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<sup>35</sup> Frederick Bausman, 36 AM. LAW REV. 184, 187.

<sup>36</sup> The above categories are necessarily procrustean, for exactly what the various learned judges meant is not always clear.

<sup>37</sup> 73 U. of PA. L. REV. 140.

of uniformity, whether or not they use these terms. So far as they have permitted it to be diverse, however, while they have assailed the doctrine of uniformity so far as absolute universal uniformity is concerned, they have not *necessarily* repudiated it in its application to those situations where the law ought to be uniform. As previously stated the field of admiralty and maritime jurisdiction, as such jurisdiction has developed in the United States, extends to matters as to which uniformity is not necessarily desirable,—may be quite undesirable in fact.<sup>38</sup> Discussion of the matters in which it is or is not desirable, whether or not within the field of admiralty jurisdiction as at present delimited, must wait for treatment in subsequent articles. For my present purpose, however,—how far the doctrine of uniformity has been recognized in our law—it may be assumed that in ordinary maritime case uniformity is desirable. Therefore so far as our courts or legislatures have permitted the law applicable in such cases to be diverse, it will be assumed that they have struck a blow at the doctrine of uniformity.

The problems that next present themselves therefore are those concerned with the law to be applied to maritime transactions. first, by the federal admiralty courts in the exercise of their jurisdiction, second by the state courts in the exercise of theirs.

The attitude of our early federal judges towards the law they were to apply has already been mentioned.<sup>39</sup> They followed the law of the sea, gathering that law from many sources, continental and English, ancient and modern. Differences between the District Courts were settled by the ultimate court of appeal—the Supreme Court. So far, then, the system was one that necessarily resulted in uniformity throughout our own admiralty courts. There were, however, certain tendencies towards diversity. One of these, the application by the admiralty courts of state statutes creating liens for necessities furnished vessels in their home ports, has already been discussed. Another was the predilection of our

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<sup>38</sup> See, also, 73 U. OF PA. L. REV. 190.

<sup>39</sup> 73 U. OF PA. L. REV. 127, 129, 131.

admiralty judges for the decided case. No doubt the doctrines of *stare decisis* worked for uniformity in the sense above mentioned, but it also works against uniformity of maritime law as an international system.<sup>40</sup> As precedents multiplied we necessarily individualized our own law, the general maritime law so far as it existed became less effective, and the door to international uniformity by way of jurisprudence (in the continental sense) was more and more blocked. Discussion of the proper function of the doctrines of *stare decisis* in admiralty law or in commercial law generally lies outside the scope of this article; but granting for a moment the desirability of uniformity in its widest application, in passing we cannot but question the unconsidered application to maritime cases of common law rules as to the binding force of precedents. If the maritime law of one nation is to be attuned to that of the rest of the world, a very different rule might well be applied. Another factor tending towards diversity in the admiralty courts is the lack of any clear rule fixing the line between matters of local concern properly subject to local regulation and matters where the local rule should not prevail. The line between jurisdiction and no jurisdiction might well have been the same line, but as has been shown, the first line, at least in tort cases, was drawn with no well-considered reasoning why it should be where it was placed rather than somewhere else.<sup>41</sup> With regard to this last factor, the situation, of course, became more acute as state legislation and regulation developed.

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\* Cf. W. S. Holdsworth, 1 *Select Essays in Anglo-American Legal History* 320. Justice Bradley, in *The Lottawanna*, 21 Wall. 558, 571 (1874), said: "If . . . with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system, the court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it" [an argument that *The General Smith*, 4 Wheat. 438 (1819), should be overruled]. But the court declined to exercise this power because, in effect, the rule in question had been recognized by the commercial community as a rule of property and large sums invested in vessels on the theory of that case.

<sup>41</sup> 73 U. OF PA. L. REV. 139. See the strictures of Justice Holmes stated in note 94.

Nevertheless, with one important exception soon to be mentioned, the maritime law was uniform in the great majority of its applications, at least throughout the United States, and those applications where it was not uniform were generally matters of local concern.<sup>42</sup> The case of *Workman v. New York*,<sup>43</sup> which fixed the principle of uniformity at least as to maritime law in admiralty courts, came late, it is true, but it established no rule of law different from what had existed in practice.

Even earlier, the Supreme Court had decided that Congress had a legislative power applicable to all matters within the field of admiralty and maritime jurisdiction without resort to the commerce clause, the field of which was not necessarily coterminous.<sup>44</sup>

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<sup>42</sup> *E. g.*, Local rules of navigation: The New York Central No. 18, 257 Fed. 405 (Cir. Ct. App., 2d Circ., 1919); Pilotage: *Ex p. McNiel*, 13 Wall. 236 (1871); *Ex p. Hagar*, 104 U. S. 520 (1881); Ferries: *Cf. Wiggins Ferry Co. v. City of East St. Louis*, 107 U. S. 365 (1882); *Cooley v. Board of Wardens*, 12 How. 299 (1851); Fisheries: *Cf. Manchester v. Massachusetts*, 139 Mass. 240 (1891); Structures in and titles to land under navigable waters: *Cf. Barney v. Keokuk*, 94 U. S. 324 (1876); *Pollard's Lessee v. Hagan*, 3 How. 212, 230 (1845). For other instances, see case collected in *The City of Norwalk*, 55 Fed. 98, 106. In many of these and similar cases the recognition of the state's power is not based on the fact that the matter regulated was local, but on considerations that would apply equally to non-local exercises. So far, therefore, these cases may be properly cited as *seemles* against the doctrine of uniformity in maritime matters. In *The City of Norwalk*, however, they are explained as falling within the State's power because local, and this has been the later tendency.

See also *J. D. Grace*, 55 Am. L. Rev. 641, 663, for the injurious effect on uniformity of a reduction in the appeals effectively taken from the Circuit Courts of Appeals to the Supreme Court, and for a suggested cure.

<sup>43</sup> *Workman v. New York*, etc., 179 U. S. 552 (1900). See also *United Fish Co. v. Erickson*, 248 U. S. 308 (1918).

<sup>44</sup> *In re Garnett*, 141 U. S. 1 (1891); *Panama R. R. Co. v. Johnson*, 264 U. S. 375 (1924); *Butler v. Boston and Savannah S.S. Co.*, 130 U. S. 527, 556 (1888); *Janney v. Columbia Ins. Co.*, 10 Wheat. 411, 418 (1825). Many acts of Congress relating to maritime matters have often been held constitutional under the commerce power, without reference to the power in question which if existent was quite sufficient, *e. g.*, *Moore v. Am. Transp. Co.*, 24 How. 137 (1860). Is it not possible that the framers considered the commerce power as extending to all matters within the jurisdictional grant? [But see Justice Bradley, *The Lottawanna*, 21 Wall. 558, 577 (1874).] If so it was not necessary to give Congress specifically a power to legislate with regard to such matters. But without realization of this appositeness, construction of the commerce power went one way and of the jurisdictional grant another, so that matters came into the domain of the latter without being within the former. It is quite as proper to impute to the framers logical consistency as it is to impute to them an intent to have jurisdiction be what it later became, and to have the commerce power be what it was later construed to be, and to infer from the existence of the hiatus between



Such a result could only have been reached on the theory that there was a federal admiralty law, as the *Workman* case subsequently made clear.

There is, however, a class of cases which does not readily fall within these principles.

The growing belief in the unfairness of the common law rule that denied an action to the estate of a man killed by the fault of another or to those injuriously affected by his death manifested itself in connection with maritime as well as non-maritime transactions. The states set about remedying this evil by statutes which were quite naturally diverse in character. The admiralty courts, in tentative fashion having no federal statute to go upon, reached various conclusions on different grounds, all of which clearly appears in the exhaustive opinion of Chief Justice Waite in *The Harrisburg*.<sup>45</sup> Some of them followed local state statutes; others, either because none were yet at hand or because they did not for various reasons believe they should follow them, reached different conclusions on different grounds as to the existence of the right to bring such actions in admiralty. Finally the question came to the Supreme Court, and the law to be applied by the admiralty courts was certainly made uniform in the narrow sense of national uniformity, but to put it mildly, that law was set at variance with the law applicable to such maritime deaths in most other civilized countries.<sup>46</sup> In this last respect, what might be termed a "second best" uniformity was later accomplished in a curious way. The lower admiralty courts seized upon local death statutes and applied them, and the Supreme Court finally sanctioned this practice.<sup>47</sup> In general, an action for causing death could be brought.

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the two, that the framers intended Congress to have no legislative power as to matters falling therein, and therefore the states to have it. The problem presented in *In re Garnett* was as to a matter within the hiatus. Assuming that the jurisdictional grant had been properly construed, and not desiring to broaden the commerce power as it had developed, the Court could reach no other conclusion if admiralty law as to such matters was to be uniform.

<sup>45</sup> *The Harrisburg*, 119 U. S. 199 (1886).

<sup>46</sup> *The Harrisburg*, 119 U. S. 199 (1886). As to foreign law, see Hughes Adm., 2d ed., 222 *et seq.*, 34 REV. INT. DE DROIT MAR. 806; cf. 38 HARV. L. REV. 499.

<sup>47</sup> *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921).

So far the law tended toward international and interstate uniformity. In details these local statutes, the only basis for recovery, differed, and to the extent that they differed the law was diverse.

At the risk of being caught in a trap of my own setting,<sup>48</sup> however, I venture to suggest that the whole history of this matter is so peculiar, and the failure of the Supreme Court in *The Harrisburg* to give effect to the prevailing international view so striking—a view consistent with the ideal of uniformity—that one is not justified in deducing a general rule therefrom. Furthermore, the jurisdictional basis of the state death statutes is nearly always territorial.<sup>49</sup> In a sense, therefore, they are local, and their applicability to maritime transactions may superficially be explained on the same ground that the application of local lien acts has been explained.<sup>50</sup> Perhaps it is enough that they have been so explained.<sup>51</sup> Such an explanation, however, is obviously false, for a local and differentiated state statute having a territorial application may affect the very person or ship it ought not to affect if the law is to be uniform in its intersectional or international relations,

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<sup>48</sup> See comments on the practice of regarding unfavorable matters as based upon exceptional considerations at the opening of this article. See also 37 HARV. L. REV. 1115, 1117, n. 23, where the learned author, according to the fashion so popular nowadays, finds the explanation for the difference between the applicability of state death acts and the non-applicability of state compensation acts in judicial prejudice in favor of one and against the other.

<sup>49</sup> The state statutes often so provide: Cf., *McDonald v. Mallory*, 77 N. Y. 546 (1829). Such statutes, however, may be made applicable to deaths upon or due to acts of those in charge of domestic vessels or even to deaths caused by citizens: Cf. *The Hamilton*, 207 U. S. 398 (1907). The predilection of construction, however, seems to favor a territorial basis, either actual or "constructive," as in the case of a domestic vessel outside territorial limits: see *The Middlessex*, 253 Fed. 142 (Dist. Ct., Mass., 1916) and comment thereon, 32 HARV. L. REV. 713; *Fisher v. Boutelle Transp. Co.*, 162 Fed. 994 (Dist. Ct., E. D. Pa., 1906, 1908).

<sup>50</sup> *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921).

<sup>51</sup> On the theory that by common opinion actions for death, however generally they may be allowed, are matters for local regulation: Hughes, Adm., 2d ed., 226; G. Philip Wardner, 21 HARV. L. REV. 75. Even so, as Mr. Hughes points out, they are maritime in nature. The mere fact that foreign methods of enforcement do not necessitate or permit an action in their "admiralty" courts does not oust our admiralty courts of jurisdiction or make the rule to be applied any the less part of our admiralty law: *Pouppirt v. Elder Dempster S. Co.*, 122 Fed. 982 (Dist. Ct., E. D. Va., 1903).

—the foreign ship or person temporarily within the territory.<sup>52</sup> The only answer to this is that uniformity is better served by having some death statute applicable than by having none.

The next problem is that relating to the law which *state courts* may apply in the exercise of their concurrent jurisdiction of maritime matters, excluding of course state attempts to enforce maritime liens by proceedings *in rem* already discussed. The concurrent jurisdiction will be conceded, although perhaps it is not irrelevant to remark again that the Constitution does not necessarily lead to the conclusion that the states were to have any concurrent jurisdiction, that though the saving clause in the Judiciary Act of 1789 did purport to save something to the states, it is not very clear what it meant to save, nor that it may rightly be regarded as a contemporaneous interpretation of the Constitution, nor even that, strictly speaking, it was constitutional at all.<sup>53</sup> Whatever the truth may be, the states did exercise a concurrent jurisdiction as to matters which then undoubtedly were regarded as within the jurisdiction of the admiralty, and as to many others which, whatever the doubts then, later came to be so regarded. Like Topsy this concurrent jurisdiction just grew, and grew without any conscious effort to correlate its exercise to the new federal scheme of things. Certainly in this early period it was not directly based on the saving clause, so far as the reports in reported cases go.

The jurisdiction was exercised in fact, and widely exercised, and as to its basis, constitutional or otherwise little can be deduced from the cases.<sup>54</sup> It seems not unlikely, however, that the explanation is not so much legal as practical. The state admiralty

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<sup>52</sup> E. g., *Aurora Shipping Co. v. Boyce*, 191 Fed. 960 (Cir. Ct. App., 9th Circ., 1911); Oregon law giving a lien was applied in an admiralty court to a ship, owned by a California corporation, and having her home port there, on which a death had occurred in Oregon waters.

<sup>53</sup> See *supra*, and also 73 U. OF PA. L. REV. 132, 129.

<sup>54</sup> In 9 Johns. (N. Y., 1812) are twelve cases which could have been brought in admiralty as rules of jurisdiction now are; in 2 Yeates (Penn., 1707-1798) 4; in 15 Mass. (1818-19) 7; in 3 H. & J. (Md., 1810-13) 3. These volumes were selected at random. Many are actions on policies of insurance, but there are actions by seamen for wages or improper treatment, by shippers for loss of goods, and by a passenger for breach of contract of carriage.

courts, for what they were worth, had gone. The federal admiralty courts were new and untried. The practitioner was not inclined to experiment with them as yet. He was not sure what was and what was not maritime, and he brought his case, whether maritime or not by their standard, before the state court, which was known to him from a period antedating the Constitution. The defendant's counsel suffered the jurisdiction to attach. It never occurred to either to ascertain what the new federal government, still tentatively feeling its way, had to say on the question, and if questions of jurisdiction occurred to any one's mind, counsel and court may well have been influenced by current English theories as to that subject, although as has been shown, English limitations on admiralty jurisdiction were not to be a part of our law.

This, then, was the actual situation and it was no doubt a situation that eventually led to the subsequent conflicts between the state and the federal admiralty courts both as to jurisdiction and as to law. But at that time it did not result in any appreciable or objectionable non-uniformity of law, because the common law of the states was under the influence of Lord Mansfield's commercialization of the common law, a commercialization which included the incorporation of much of the maritime law merchant into the common law;<sup>55</sup> and it was particularly in mercantile matters that this jurisdiction of the state courts was exercised. Furthermore, the conception that the maritime law was part of the *jus gentium*,<sup>56</sup> that such law was obligatory on the state courts, and that classical authorities and codes were the evidence as to its

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<sup>55</sup> Holdsworth, 2 Select Essays 315-20; *Chandler v. Grieves*, 2 H. Bl. 606 n. (1791-2). Cf. *Conrad v. De Montcourt*, 138 Mo. 311 (1897); 2 Select Pleas Admiralty (11 Selden Soc.) lxxx. The influence of Lord Mansfield on our law appears in the following maritime cases, chosen more or less at random: *Insurance*, *Clarkson v. Phenix Ins. Co.*, 9 Johns. 1 (1812); *Hood v. McMurtrie*, 1 Yeates 114 (1792); *Thurston v. Koch*, 2 Dall. 348 (Cir. Ct., Pa., 1800); carriage of goods, *Reynolds v. Toppan*, 15 Mass. 370 (1819); *Penoyer v. Hallett*, 15 Johns. 331 (1818); appurtenances of a vessel, *Richardson v. Clark*, 15 Me. 421 (1838).

<sup>56</sup> Cf. *Nimick v. Holmes*, 25 Pa. 366, 371 (1855); *Copeland v. N. E. M. I. Co.*, 2 Met. 432, 445 (1841); *Boyce v. Moore*, 2 Dall. 196 (Pa., 1793); *Vasse v. Ball*, 2 Yeates 178, 182 (Pa., 1797); *Ludlow v. Union Ins. Co.*, 2 S. & R. 119, 125 (Pa., 1815); *Smith v. Gilbert*, 4 Day 105 (1807); *Chase v. Alliance Ins. Co.*, 9 Allen 311 (1864).

content, seems to have been accepted by the state courts as it was in the federal courts.<sup>57</sup> In short, we find the state courts applying the same law that the federal courts applied; in other words much the same condition existed in practice that the *Jensen* case and its successor have declared must exist as a matter of law.

In the exercise of jurisdiction over these matters, however, the decisions in the various states tended to diverge from the uniformity of law with which they began. An insurance problem would be decided in New York and another similar one in Massachusetts, each decision being based on the common body of law referred to. The next case in these jurisdictions would, however, be decided with reference to the precedent so established, and thus they would work away from the common source.<sup>58</sup> The reporting of decisions played its part. The rule of *stare decisis* was given the same application and emphasis that it received in matters of purely local concern. After all they were state courts without obligations to each other. The judges in the states can scarcely be blamed for following old habits when in many matters they can scarcely have known they were exercising a concurrent jurisdiction, the standards for determining admiralty's cognizance of these matters not yet having been developed.

At all events, while the admiralty courts were still mainly engrossed with questions as to what their jurisdiction was, the states were developing more or less diverse systems of substantive law of their own as to maritime matters. On the other hand trade situations were simpler, legislation and regulation much less extensive, and the extent and results of such diversity correspondingly less than they would be today if the condition had remained uncontrolled. Such control came to some extent from what might be called an intensification of admiralty jurisdiction. Suitors for various reasons sought the admiralty courts where formerly they

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<sup>57</sup> *Ward v. Ames*, 9 Johns. 138 (1812); *Broadhurst v. Col. Ins. Co.*, 9 Johns. 9 (1812); *Fuller v. McCall*, 2 Dall. 219 (Pa., 1795); *Camberling v. McCall*, 2 Dall. 280 (Pa., 1798); *Appleton v. Crowninshield*, 3 Mass. 443 (1807); *Donnell v. Columbian Ins. Co.*, 2 Sumn. 366 (Cir. Ct., Mass., at law, 1836); *Richardson v. Clark*, 15 Me. 421 (1838).

<sup>58</sup> Cf. *Coolidge v. Glouc. Mar. Ins. Co.*, 15 Mass. 340 (1819); *Marine Ins. Co. of N. Y. v. Un. Ins. Co.*, 9 Johns. 186 (1812).

had gone to those of the states. The result was the growth of substantive admiralty law, and this the states tended to follow.<sup>59</sup>

Without examination of every case in all the states, the exact extent of this diversity cannot be ascertained. This would be a hopeless task, for innumerable cases really maritime in nature lie buried in digests, encyclopædias and text books among similar non-maritime cases. No one has ever separated them, and perhaps it would not be worth while ever to do so. There are, however, certain situations where for one reason or another the existence of such diversity becomes apparent, and some of these will now be considered.

We have seen how the admiralty courts applied local death acts. The question arises, whether the states in the exercise of their concurrent jurisdiction may also do so. It should be borne in mind that to permit them to do so resulted in no greater diversity than that which admiralty law, rightly or wrongly, had already sanctioned. A general argument, based on this particular power in the states, to the effect that they may always (or until Congress has declared otherwise under an appropriate power) apply any law they please is necessarily much weakened. Moreover, actual authority upon the existence and extent of this power in the states is scanty. Their right to apply their own death act was contested in the Supreme Court shortly after and upon similar reasoning to that successful in *The Moses Taylor* and *The Hine v. Trevor*, and the power was recognized.<sup>60</sup> When this case was decided, however, it was not yet settled that the admiralty law was opposed to that laid down in the state statute,—though the court seems to assume that it might be so. Had the admiralty rule turned out to be the same (in which case there would have been no diversity of law), who would have said that this case contained

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<sup>59</sup> *E. g.*, *Scarfe v. Metcalf*, 107 N. Y. 211 (1887); *Baker v. Lewis*, 33 Pa. 301 (1858); *Kalleck v. Deering*, 161 Mass. 469 (1894), *Holmes, J.*; *Conrod v. De Montcourt*, 138 Mo. 311 (1897). For an instance where the state adopted the divided damage rule by statute: *Stewart v. Henry*, 3 Bush 438 (1867). In some cases the court followed some admiralty rules and not others: *Union SS. Co. v. Nottingham*, 17 Gratt. 115 (1866).

<sup>60</sup> *Steamboat Co. v. Chase*, 16 Wall. 522 (1872). See also *Sherlock v. Alling*, 93 U. S. 99 (1876).

more than a mere *dictum* or *semble* as to the power of the state to enforce its own law? It contains no less a *semble* or *dictum* because the admiralty law did turn out to be divergent. Nor seemingly has this question been brought directly before the Supreme Court after it had been determined what the federal maritime law was. The right of the state to apply its own death act in its own courts is, of course, of minor importance, if in the application of that act whether in state or admiralty court all the current state jurisprudence as to contributory negligence, the fellow servant rule, assumption of risk, etc., goes with it. Such has been the weight of authority,<sup>61</sup> but there has been a decision the other way as to the application of this jurisprudence in the admiralty courts.<sup>62</sup> If this is right and if the state court is permitted to exercise a concurrent jurisdiction, diversity is added to diversity. If it is wrong, diversity to some extent disappears.

Apart from this instance of uniformity in diversity, cases are singularly few where the Supreme Court has sanctioned the application by state courts of their own law in the exercise of their concurrent jurisdiction. Opponents of the doctrine of uniformity naturally reason from this that the rule was so well established that it went without saying. This they also declare was the traditional view of the admiralty courts.<sup>63</sup> In the face of such a statement by men so qualified to judge, it would be presumptuous to say the contrary. Undoubtedly it was the tradition. But one is permitted to assert that as such it marks a departure from the still earlier tradition of uniformity in such matters, and that the legal foundation for it in the Supreme Court is slight. The cases cited are these: *The Steamboat New York v. Rea*.<sup>64</sup> The owner of a brig brought a libel *in rem* against a steamboat for damages done to the brig by a collision. The steamboat was found to be in fault; and the brig to be guiltless. It was argued, however, that though the brig complied with the federal rule as to her lights, she did not comply with the rule prescribed by a New York stat-

<sup>61</sup> See authorities collected in 73 U. OF PA. L. REV. 201.

<sup>62</sup> *The Devona*, 1 Fed. (2d) 482 (Dist. Ct., Me., 1924).

<sup>63</sup> *E. g.*, Judge Charles M. Hough, 37 HARV. L. REV. 529, 538 *et seq.*

<sup>64</sup> 18 How. 223 (1855).

ute, not inconsistent with the federal rule but requiring the light to be carried at a higher elevation. Justice Nelson said: "This is a rule of navigation prescribed by the laws of New York, and is doubtless binding upon her own courts." He then held that failure to comply with it did not in the admiralty court show fault on the part of the brig. *Atlee v. Packet Co.*:<sup>65</sup> The owner of a barge libelled the owner of a pier for loss of the barge due to a collision with the pier. Both were found to be in fault. The Supreme Court reinstated a decree of the District Court with this finding, decreeing division of damages. Miller, J., said: "In the common law court the defendant must pay all the damage or none." *The Atlas*:<sup>66</sup> This was a similar case, and a similar dictum was uttered by Clifford, J.

*Quebec S. S. Co. v. Merchant*:<sup>67</sup> A stewardess brought an action in the state court for personal injury through falling overboard because of the condition of the railing due to the negligence of one or the other of two members of the crew. The action was removed to the Circuit Court because of diversity of citizenship. Plaintiff had a verdict. It was held in the Supreme Court that it was error to refuse to direct a verdict for the defendant, because each of the two whose negligence might have caused the injury was a fellow servant of the plaintiff. Assuming that the stewardess was a seaman, she was undoubtedly injured in the service of the ship (she was emptying slops at the time). As the admiralty law is now, she would undoubtedly have recovered for care and cure and possibly for maintenance.<sup>68</sup> But at the time this case was decided, the admiralty law even in the case of seamen was flirting

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<sup>65</sup> 21 Wall. 389 (1874). Some state cases that seem to apply this dictum were decided without thought that the jurisdiction was concurrent, admiralty jurisdiction as to the locality not yet being established: *Baker v. Lewis*, 33 Pa. 301 (1858); *Broadwell v. Wigert*, 7 B. Mon. (Ky.) 39 (1846); *Owners of The Farmer v. McCraw*, 26 Ala. 189 (1855). They are not authority that the rule to be applied at common law is contrary to the admiralty rule when concurrent jurisdiction is being exercised.

<sup>66</sup> 93 U. S. 302 (1876).

<sup>67</sup> 133 U. S. 375 (1890).

<sup>68</sup> *The Osceola*, 189 U. S. 158 (1903); *Chelentis v. Luckénbach SS. Co.*, 247 U. S. 372, 384 (1918).



with the fellow servant rule.<sup>69</sup> It is not evident that the same result might not have been reached in admiralty. The rule stated by the court is not stated as a peculiarly common law rule.

*Belden v. Chase*:<sup>70</sup> An action at law was brought in a state court for loss of plaintiff's boat due to a collision with defendant's. Plaintiff had a verdict for the full value of his boat, interest and costs. The question of negligence on both sides turned partly on how far the two boats had complied with the federal rules of the road. Because the construction of these was involved, the Supreme Court held that it had jurisdiction under a writ of error, Chief Justice Fuller saying that it was of vital importance that these rules should be interpreted and enforced in the same sense by state courts that they are by federal admiralty courts. He also stated that in order to maintain the action the plaintiff must establish that defendant's negligence was the sole cause of the accident, and that plaintiff could not recover, although defendant were negligent, if plaintiff were also negligent and such negligence contributed to the accident. He cited as authority *Atlee v. The Packet Co.* Because instructions requested by the defendant, which if given and believed to be true would have made it proper for the jury to find the plaintiff negligent, were not given, the judgment was reversed. The remarks of Chief Justice Fuller as to the effect of contributory negligence are of course only a dictum, for the case would have had to be sent back for a new trial, whether the divided damage rule were to be applied or not, the plaintiff having recovered in full for the loss of his boat.

It will be noticed that these cases, with but one possible exception, contain dicta only on the point in question, and are, without any exception,<sup>71</sup> cases where the state rule was, generally

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<sup>69</sup> Frederick Cunningham, 18 HARV. L. REV. 294; Fitz-Henry Smith, Jr., 19 HARV. L. REV. 418, 420. But see *The Osceola*, 189 U. S. 158, 175 (1923); Justice Brown's third point.

<sup>70</sup> 150 U. S. 674 (1893). But cf., *Germaine v. Albina Mar. I. W.*, 1923 A. M. C. 303 (Dist. Ct., Ore., 1922); *Duggins v. Watson*, 15 Ark. 118 (1854).

<sup>71</sup> It is quite possible that research might bring to light other cases in the Supreme Court, where in a maritime transaction state law adverse to the defendant was in fact applied, as, for example, in a case involving a policy of marine insurance, on appeal from a lower federal court where jurisdiction was taken because of diversity of citizenship, and the sole question was

speaking, more favorable to the defendant than the rule that would have been applied in admiralty; for ordinarily a defendant, sued for damage due to a collision between his vessel and that of the plaintiff, would prefer the application of a rule by which the plaintiff if guilty of contributory fault would lose entirely rather than a rule, by which he would recover half damages;<sup>72</sup> and similarly, a ship owner sued by an injured seaman would prefer the application of a rule by which he would be excused entirely if found free from fault.<sup>73</sup> In cases of concurrent jurisdiction, it is the plaintiff who chooses the forum. The defendant cannot oppose his choice, but must defend in the court where he has been called. Justice Miller, in *Atlee v. Packet Co.*, said in explanation of the dictum he had uttered: "The plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum."<sup>74</sup> In other words the plaintiff having chosen the common law forum may not complain of the application of its law unfavorable to him. It is a very different thing to say that the defendant, who did not choose to be in that court, may not complain of state law which he believes unfavorable to him. Conceding that he might have so complained, in none of these cases did he so complain. Apparently, therefore, the Supreme Court was not called upon to

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one of substantive law. Most of the maritime cases likely to find their way to the Supreme Court in this manner (but not all) are commercial cases governed by the rule of *Swift v. Tyson*, 16 Pet. 1 (1842), the doctrine of which in such applications co-operate, so to speak, with the doctrine of uniformity discussed in these articles: *Cf.*, *Washburn and Moen Mfg. Co. v. Reliance Mar. Ins. Co.*, 179 U. S. 1 (1900).

<sup>72</sup> Conceivably a defendant, who believed himself more or less unpopular with the jury, might prefer to have the opportunity for compromise latent in the admiralty rule presented to them.

<sup>73</sup> Conceivably, again, if the evidence were conflicting as to whether the fault was that of a fellow-servant or of the defendant himself or for which he was legally accountable at common law, he might prefer the certain but less extensive liability of the admiralty law.

<sup>74</sup> 21 Wall. 389, 395 (1874). See also *Sawyer v. Eastern S. B. Co.*, 46 Me. 400 (1859). An argument that a libellant for contribution as a joint tort-feasor in a maritime collision, he having been sued at common law by the third party injured therein and having paid the judgment, could not complain of the consequences of such common law judgment at common law (his sole liability without right of contribution) did not meet with favor in *The Ira M. Hedges*, 218 U. S. 264 (1910).

decide this question until the *Jensen* case.<sup>75</sup> They then decided in favor of the defendant's contention,—that he, in the state court without choice, might now choose to have the maritime law applied. In other words, except for the doubtful precedent of the death act cases, the *Jensen* case was one of first impression in the Supreme Court, not merely because the application of a workmen's compensation act was involved, but because it was the first case where the plaintiff was seeking to force on an unwilling defendant a rule of the state court unfavorable to that defendant and complained of by him. Of course this question had arisen in the state courts, and state law unfavorable to the defendant had been applied over his objection,<sup>76</sup> but as often, though in somewhat different situations, the problem was the same as that presented to the Supreme Court before the *Jensen* case.<sup>77</sup>

Always with the reservation that its minor premise may be unsound—that granting the doctrine of uniformity, it should not necessarily be so applied as to override local workmen's compensation acts at least in some cases,—the *Jensen* case falls into line. It was a new step so far as concerns the announcement of its major premise in relation to the state's power to enforce its own law in the exercise of concurrent jurisdiction, but except upon deductions

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<sup>75</sup> 244 U. S. 205 (1917).

<sup>76</sup> Collision, that admiralty rule of presumption of fault from breach of rules does not apply to plaintiff: *Union SS. Co. v. Nottingham*, 17 Gratt. 115 (1866), dictum; *Sawyer v. Eastern S. B. Co.*, 46 Me. 400 (1859). Partition: *Andrews v. Betts*, 8 Hun 322 (1876); but *cf. Fischer v. Carey*, 173 Cal. 185 (1916), and distinguish cases that gave relief on ground that admiralty could not: *Reynolds v. Nielsen*, 116 Wis. 483 (1903); *Swain v. Knapp*, 32 Minn. 429 (1884). Marine insurance: *Thwing v. Great Western Ins. Co.*, 111 Mass. 93 (1872), but *cf. Chase v. Alliance Ins. Co.*, 9 Allen 311 (1864). Authority of master: *Crawford v. Roberts*, 50 Cal. 235 (1875); but *cf. Cupisino v. Perez*, 2 Dall. (Pa.) 194 (1793). The contrast between these decisions indicates the growth of law away from its original standard. *Cf. Lord v. Hazeltine*, 67 Me. 399 (1877); *Brown v. Gilmore*, 90 Pa. 40 (1879), where defendant complained of the common law rule of contributory negligence, after verdict for the plaintiff.

<sup>77</sup> Collisions: *New York Harbor T. B. Co. v. N. Y. L. E. and W. R. R. Co.*, 148 N. Y. 574 (1896); *The Arctic Ins. Co. v. Austin*, 69 N. Y. 470 (1877); *Sawyer v. Eastern S. B. Co.*, 46 Me. 400 (1859); *Union SS. Co. v. Nottingham*, 17 Gratt. 115 (1866), but see n. 76; *cf. Simpson v. Hand*, 6 Whart. 311 (1840). Fellow-servant rule as to seamen's injuries: *Kalleck v. Deering*, 161 Mass. 469 (1894); *cf. Gabrielson v. Waydell*, 135 N. Y. 1 (1892). Salvage: *Cf. Hunter v. St. L. and M. T. Co.*, 25 Mo. App. 660; *The Albany City Ins. Co. v. Whitney*, 70 Pa. 248 (1872).

drawn from the peculiar death act cases it was a step in continuation of previous steps already taken by the Supreme Court.

To summarize the whole matter:—The operative field of maritime law expanded, and resort to admiralty courts became more frequent. The existence of that law as a uniform system was threatened by the enforcement in state courts of their own divergent lien laws. The Supreme Court restored uniformity in large part by denying to state courts all jurisdiction over such proceedings. A condition of local non-uniformity existed with reference to liens for necessities furnished a vessel in her home port. When from this condition the deduction was drawn that the states might go further and create liens having a non-local application, the Supreme Court sharply limited their power in this respect.<sup>78</sup> When the Supreme Court overrode the growing admiralty law with common law conceptions in *The Harrisburg*, the lower courts restored a second best uniformity by applying local death acts more alike, perhaps, in the fact that they gave a right of action than different in their various details. Lastly,—the Supreme Court once more appearing as hero,—when the state courts sought to enforce their own diverse law (unreasonably so by temporary hypothesis) upon defendants who had not willingly sought their forums, the Supreme Court declared that this might not be done. It may not have acted within a then common legal tradition, but in preferring the uniformity of the maritime law to the diversity of state law it acted within the scope of a far greater historical tradition and did exactly what it had done before.

Though of minor importance no doubt, it did not in so doing strike across the written word. The familiar dicta of Justice Bradley,<sup>79</sup> in *The Lottawanna* deserve quotation, for this was one of the few cases where a judge in the Supreme Court envisaged our maritime law as a whole.

The question before the court was whether the doctrine of *The General Smith*<sup>80</sup> (that our maritime law gave no lien for

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<sup>78</sup> 73 U. OF PA. L. REV. 140.

<sup>79</sup> *The Lottawanna*, 21 Wall. 558, 572, 574, 575 (1874).

<sup>80</sup> 4 Wheat. 438 (1819).

necessaries furnished a vessel in her home port) should be overruled. After pointing out reasons why this should not be done<sup>81</sup> and (in effect) that the maritime law of each country was not part of a general system of superior sanction to that of its own government, and might well differ from the general maritime rule in matters on the outside boundaries of the maritime law "where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other," Justice Bradley further said: ". . . the convenience of the commercial world, bound together as it is, by mutual relations of trade and intercourse, demands that in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. . . . That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' " After pointing out that the Constitution does not indicate the criterion by which this law shall be determined, he continues: "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."<sup>82</sup> Furthermore, twenty-four years before the *Jensen*

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<sup>81</sup> See n. 40.

<sup>82</sup> Justice White in *Workman v. New York*, 179 U. S. 552, 558 (1900), refusing to apply in an admiralty case a rule of New York State as to non-liability, said that if the state law were given effect "there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one thing in another; one thing in one part of the United States and a different thing in some other part . . . It would

case, almost the very language used by Justice McReynolds in stating the major premise was uttered by Judge Addison Brown in the Southern District of New York in a decision affirmed by the Circuit Court of Appeals, and singularly enough, a death act case.<sup>83</sup>

It would be possible to instance other examples either of the operation of the doctrine of uniformity or of the contrary, but these all relate to comparatively minor matters or to matters involving the working out in detail of what has already been discussed. The part played by federal legislation might be expanded into a book by itself. Though Congress has often failed to unify the maritime law where opportunity offered, or has done so only very slowly, the only striking instances where it has acted directly against the ideal are those resulting from the decisions of the *Jensen* case and its successors.<sup>84</sup> These may be explained, however, on the ground of a dislike of the minor premise. On the

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come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent."

Justice Brown, in *The Roanoke*, 189 U. S. 185, 195 (1903), holding that a statute of the State of Washington purporting to give a maritime lien to a subcontractor, was ineffective in an admiralty court (therefore ineffective altogether) as to a vessel registered in Chicago, said of the master of such a vessel: "With full authority to bind the vessel, his position is such that it is almost impossible for him to acquaint himself with the laws of each individual state he may visit, and he has a right to suppose that the general maritime law applies to him and his ship, wherever she may go, unhampered by laws which are mainly intended for local application, or for domestic vessels."

These are no doubt merely dicta as to proceedings in state courts, but their reasoning applies with equal force when local state law is being applied against a defendant in such a court.

<sup>83</sup> *The City of Norwalk*, 55 Fed. 98, 105 (Dist. Ct., S. D., N. Y., 1893), 61 Fed. 364 (Circ. Ct. App., 2d Circ., 1894).

<sup>84</sup> Act Oct. 6, 1917, c. 97 (40 Stat. at L. 395); see *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920). Act June 10, 1922, c. 216 (42 Stat. at L. 634); see *State of Washington v. Dawson*, 264 U. S. 109 (1924). Some may believe that certain sections of the Seamen's Act (Mar. 4, 1915, c. 153, 38 Stat. at L. 1165) and of the "Jones" Act (June 5, 1920, c. 250, esp. Sec. 28, (41 Stat. at L. 988, 999) are of this nature. See also Act June 5, 1920, c. 250, Sec. 33 (41 Stat. at L. 1007), held constitutional in *Panama R. R. Co. v. Johnson*, 264 U. S. 375 (1924).

other hand there is the limited liability act,<sup>85</sup> the adoption of the international rules of the road<sup>86</sup> and of the stand-by and salvage act,<sup>87</sup> the enactment of the Lien Act in 1910,<sup>88</sup> doing away to a large extent with the such non-uniformity as resulted from the recognition of the enforceability of domestic lien laws, and of the Death Act of 1920, in which, however, Congress only went part way.<sup>89</sup> Similarly, so far as the ideal of uniformity as a whole is concerned, much might be said of the strong movement towards uniformity of maritime law as a whole, manifested largely by the work of the International Maritime Committee, and of the Maritime Law Committee of the International Law Association.<sup>90</sup> Rules formulated as to carriage of goods by sea have already been, with but slight modifications, enacted by Parliament,<sup>91</sup> and are now before Congress. Curiously enough, an act of Congress

<sup>85</sup> Act Mar. 3, 1851, and as amended; R. S., Secs. 4282-9; 23 Stat. at L. 57, Sec. 18; 24 Stat. at L. 80, Sec. 4. The Supreme Court did not recognize limited liability as part of our maritime law although it was part of the general maritime law (2 Danjon, Dr. Mar., Secs. 565, 566, 567, 59; 2 Ripert, Dr. Mar., pp. 169 *et seq.*), and had been applied as such in the lower federal courts: *The Rebecca*, 1 Ware 187 (Dist. Ct., Me., 1831).

<sup>86</sup> *Cf. The Delaware*, 161 U. S. 459 (1896).

<sup>87</sup> Act Sept. 4, 1890, c. 875, 26 Stat. at L. 425; Act of Aug. 1, 1912, c. 268, Sec. 1, 37 Stat. at L. 242.

<sup>88</sup> Act June 23, 1910, c. 373, 30 Stat. at L. 604; *cf.* Act June 5, 1920, c. 250, Sec. 30, 41 Stat. at L. 998.

<sup>89</sup> Act Mar. 30, 1920, c. 111, 41 Stat. at L. 537.

<sup>90</sup> Hague Rules: 33 REV. INT. DE DR. MAR. 178, 261, 495, 502, 684, 701, 976; 1 REV. DE DR. MAR. COMP. 652; 2 *id.* 25, 37, 720, 722; 3 *id.* 617, 618, 627, 632; 4 *id.* 13, 49, 55; 7 *id.* 29; 8 *id.* 366.

Brussels Convention of September 23, 1910, as to Collision at Sea. See Jacques Arriu, *L'Unification du Droit Maritime*, Toulouse, 1913, pp. 15 *et seq.*; 3 Ripert, Dr. Mar., 2d ed., Sects. 2063 *et seq.*, with bibliography and list of nations adopting it, not including ourselves.

Assistance at Sea: Arriu, *op. cit.*, pp. 20 *et seq.*

Immunity of state-owned merchant vessels: 34 REV. INT. DE DR. MAR. 1, 21, 24, 47, 471, 520; 2 REV. DE DR. MAR. COMP. 25, 29, 721; 3 *id.* 608; 4 *id.* 595, 7 *id.* 32.

York-Antwerp Rules (General Average): 1 REV. DE DR. MAR. COMP. 1, 638; 2 *id.* 719; 7 *id.* 31, 601; 8 *id.* 1, 616.

Compulsory insurance of passengers: 7 REV. DE DROIT MAR. COMP. 648.

In general. 1 REV. DE DR. MAR. COMP. 53; 2 *id.* 48; 4 *id.* 64; 7 *id.* 33, 645; 8 *id.* 668; Bulletin No. 47, International Maritime Committee, Antwerp, 1921.

See also bibliographies relating to uniformity in maritime law: Arriu, *op. cit.* 165; 1 Ripert, Dr. Mar. 2d ed., 83-91; 2 REV. DE DR. MAR. COMP. 783, 788; 3 *id.* 633; 4 *id.* 628; 5 *id.* 624; 7 *id.* 659, 661; 8 *id.* 679.

<sup>91</sup> 14 & 15 Geo. 5, c. 22.

in 1893,<sup>92</sup> tending certainly towards diversity of a sort at the time it was passed, has now proved an agent towards uniformity. The general principles expressed in the Harter Act, representing as they did a compromise between shipper and carrier, were the basis of the rules in question and are now largely the law of England.

In conclusion, therefore, I submit that the doctrine of uniformity is a part of our law, not merely because it has been made so by the *Jensen* case and its successors,<sup>93</sup> but because of the tendency of that law as a whole throughout all its past history. Furthermore, it is so deeply a part of our law that we should no longer concern ourselves overmuch with questions as to its legal existence. It is far more worth while to consider how far the existing particularism of our maritime law comports with the doctrine, and,

<sup>92</sup> Act Feb. 13, 1893, c. 105, 27 Stat. at L. 445.

<sup>93</sup> *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917); *Chelentis v. Luckenbach SS. Co.*, 247 U. S. 372 (1918); *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 139 (1920); *Grant Smith-Porter Ship Co. v. Rhode*, 247 U. S. 469 (1922); *Carlyle Packing Co. v. Sandanger*, 259 U. S. 255 (1922); *State Industrial Com. v. Nordenholt Corp.*, 259 U. S. 263 (1922); *State of Washington v. Dawson*, 264 U. S. 219 (1924); *Robins Dry Dock and Repair Co. v. Dahl*, 45 S. Ct. R. 156 (1925).

*Cf.*, *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109 (1924). It has been contended that this case militated against the doctrine of uniformity (see 37 HARV. L. REV. 1118). There the Supreme Court (McReynolds, J., dissenting) held that plaintiff's application to the state court of New York for an order directing defendant to join with it in an arbitration of a dispute arising out of a charter party, executed in New York between the parties, pursuant to an agreement to that effect in the charter party was properly granted. The state court had purported to act under the Arbitration Law of New York (April 19, 1920, c. 275, amended Mar. 1, 1921, c. 14). Justice Brandeis, in the opinion of the court, pointed out that in admiralty agreements to submit controversies to arbitration are valid, although "The agreement whether executory or executed, cannot be enforced in admiralty by specific performance; merely because that court lacks the power to grant equitable relief. *The Eclipse*, 135 U. S. 599, 608." In short, the state law does not differ from the admiralty law, although the state, being able to provide the remedy of specific performance as the admiralty cannot, alone may put into effective operation this now-diverse law, when the arbitration agreement is executory. Even assuming the state law to be diverse, an unwilling defendant is not being forced to submit to it against his will, having agreed in the charter party to do what the state compels him to do. And again, even though we assume that defendants who make such agreements may, under this case, be subject to diverse state laws, the vital thing is that the agreement to arbitrate is enforceable. This result (as in the death act cases) results, it would seem, in a "second-best" sort of uniformity. See, for the effect of arbitration, clauses in maritime matters abroad: 2 Ripert, *Dr. Mar.*, 2d ed., Sec. 1460; 3 *id.*, Sec. 2447; 34 REV. INT. DE DR. MAR. 1112.



For the economists, how far it is in itself desirable. A successful blow at the doctrine would, I venture to say, shatter the whole fabric of our admiralty and maritime system. Perhaps, because of isolationist policies and the increased importance of states' rights (granting their truth), it ought to be shattered, but that is a different problem and for others to settle. Certainly such a blow would bring added justification to the strictures of Justice Holmes as to admiralty jurisdiction and maritime law.<sup>94</sup> The doctrine of uniformity, however, may furnish a basis for making those strictures no longer deserved. Granting its continued existence, our immediate problem is to consider how far our existing law comports with the doctrine and wherein that law ought to be changed. Lacking a complete report on maritime conditions as they now are, let us postulate the facts as best we may, and discuss how far that law corresponds to the uniformity that they make desirable.

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\* "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." *The Blackheath*, 195 U. S. 369 (1904); "The maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea." *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 220 (1904).